77-1477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

WILLIAM DAVID FINLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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Applicable Constitutional Amendments

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Digest Reference: Search and Seizure, §§ 1-16.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Cross References: Deprivation of due process by state, see Amendments, Art. XIV, § 1. Rights of accused, see also Amendments, Art. VI.

Digest References: Constitutional Law, §§ 513-854; Criminal Law, §§ 22-40; Eminent Domain, §§ 1-114; Indictment, etc., §§ 8-12; Witnesses, §§ 72-94.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Cross Reference: Rights of accused, see also Amendments, Art V.

Digest References: Criminal Law, §§ 46-53: §§ 17, 33, 34; Indictment, etc., §§ 8-12.

Applicable Statutes and Rules

21 U.S.C. § 812. Schedules of Controlled Substances

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this title [Oct. 27, 1970] and shall be updated and republished on an annual basis thereafter.

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

21 U.S.C. § 841. Prohibited Acts A—Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * * * * * *

(b) Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. * * * Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment. * * *

Cases Cited:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

WILLIAM DAVID FINLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Your Petitioners respectfully pray this Honorable Court for the issuance of a Writ of Certiorari to the Honorable United States Court of Appeals for the Eighth Circuit, to review a Judgment and Opinion of that Court in the above entitled cause, being there captioned and numbered as: United States of America, Plaintiff v. William David Finley, Defendant No. 77-1663 and United States of America, Plaintiff v. Sylvia Hicks, Defendant, No. 77-1664 (Consolidated Appeals). Said Judgment was entered on the 28th day of February, 1978, (Appendix A-12) A Petition for re-hearing duly filed was denied on March 22, 1978 (Appendix A-17)

JUDGMENTS AND OPINIONS BELOW

This case originated with an Indictment (Appendix A-1) in the United States District Court for the Eastern District of

Missouri, Eastern Division on the 23rd day of June, 1977 as Cause No. 77-159CR(4) naming both, William David Finley and Sylvia Hicks, as co-defendants in two counts of sale of Cocaine, a Schedule II Controlled Substance, in violation of Section 841(a)(1) Title 21, United States Code.

The two defendants were tried together in one trial before the Honorable District Court, sitting without a jury, on waivers by both the defendants and the Government. The honorable Court made findings of fact, that both defendants participated in both sales mentioned in the two counts of the Indictment, and the Court found both defendants "Guilty" of both Counts of the Indictment.

The Court sentenced defendant William David Finley to twelve (12) years confinement in the custody of the Attorney General of the United States, followed by a term of three (3) years "special probation". Defendant Sylvia Hicks was sentenced to Four (4) years confinement in the custody of the Attorney General with a "special probation" term of three (3) years to follow that confinement.

These sentences were imposed on the 15th day of August, 1977. Notices of Appeal were duly filed on August 17, 1977 and Docket Numbers of 77-1663 (Criminal) and 77-1664 (Criminal) were assigned in the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit Court of Appeals considered these cases on a Consolidated Brief, without oral argument and issued its Opinion and Judgment affirming the District Court on February 28, 1978. A Petition for Re-Hearing and Re-Hearing en banc was filed and was denied on March 22, 1978. We know of no publication of these Judgments and Opinions, to date. A Mandate from the Eighth Circuit Court of Appeals was filed on March 28, 1978.

It is this decision and Opinion which the Petitioners respectfully pray to be reviewed and set aside so that the Petitioners may be afforded the right to have the Trial Court provide a fair and impartial trial.

GROUNDS FOR INVOKING JURISDICTION

The Jurisdiction of this Honorable Court is invoked under Section 1254, Title 28, United States Code, Providing:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

REASONS FOR GRANTING THE WRIT

(a) The Court of Appeals for the Eighth Circuit has in these two cases rendered a Decision and Opinion contrary to and in conflict with Opinion and principles previously announced by other United States Courts of Appeals on the same matters as those involved in and decided in the cases at bar.

(b) The Court of Appeals for the Eighth Circuit has herein considered an important question of national concern, which has been considered by the Courts of Appeals in a number of other Circuits rendering decisions diametrically opposed to each other and not heretofore settled by this Honorable Court but which should be settled on a national basis to provide a single rule of law applicable to an ro be followed by all the Circuits consistently instead of having different rules for the several geographical areas in the several Circuits.

On these grounds as more fully amplified below, your Petitioners respectfully ground their prayers for the Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

QUESTIONS PRESENTED FOR REVIEW

I

Was the District Court in error when it failed to suppress recorded monitored telephone conversations of the defendants, made without a prior warrant from a Magistrate?

II

Was the sale of a Controlled Substance by defendants the result of unlawful entrapment where a Federal Agent Provocateur (a cripple in a wheel chair), in order to have his own charges of sale dismissed, initiated a purchase of Cocaine through the defendants by repeated calls after being first rebuffed?

III

Was the District Court in error for failing to order the Government, on request from the defendants, to disclose the criminal record of the Agent Provocateur used as the chief witness by the Government?

STATEMENT OF THE CASES

Foreward:

These cases present questions concerning entrapment by Federal officers, monitored telephone taps, and Disclosure refused by the trial Court, problems which have troubled the conscience

of this Honorable Court on other occasions, but which still require clarification.

This is a consolidated Petition of two defendants Indicted in a two count Indictment, charging the sales of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. Sections 812 and 841.

The Facts:

One Albert Moore, a cripple, confined to a wheelchair, unable to use his legs, was apprehended "red handed" by Federal officers for selling them "Heroin" a controlled Schedule II substance. (T16)* He was then recruited as a paid "Agent Provocateur" for the Federal Enforcement Administration (T16) to arrange distribution of controlled drugs in the presence of other Agents, in return for the dismissal of his own offenses. (T65) He was given immunity against prosecution for past as well as future offenses, to continue trafficking in illegal drugs, with the knowledge and assistance of the Federal Agents. He was to and did, instigate and participate in drug sales, and purchases in the presence of the Federal Agents.

To assist Mr. Moore, the Government Enforcement Administration leased and established two apartments having a common wall between them in the dining rooms, at 4221 and 4231 Geraldine Avenue in the City of St. Louis, Missouri, in the Eastern District of Missouri. (T13) The common wall was altered, with a special mirror installed, so that in No. 4231 there appeared to be an ordinary mirror on the wall, while in 4221 one could look through this glass and see clearly what transpired in 4231. (T32) Mr. Moore pretended to reside in 4231, but used it only for drug transactions. He invited his prospective victims there to conclude transactions under the

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* Citations T... are to the Transcript in the District Court.

watchful eyes, cameras, and recording devices of Government Agents. (T33) In the period from December 1976 to June 1977 he was paid $2,300.00 in addition to funds given him to purchase drugs in illegal transactions, as a "Co-operating Individual." (T16)

In January 1977 Mr. Moore started calling the defendant Finley, who was then in a hospital recuperating from hip surgery, to arrange to purchase "some of the gal" (Cocaine) through Finley, who first told him he "didn't mess around with that" (T100) but later, after several calls, he said he would see what he could do, since he knew Moore was paralyzed. Finally on February 9, 1977 Finley told Moore he could get him some cocaine and agreed (on the phone) to deliver it to Moore at 4231 Geraldine. Defendant Finley was just out of the hospital and was still on crutches. He asked a friend co-defendant Miss Sylvia Hicks to drive him there and carry his wallet (T116) and other items including the cocaine.

Moore had known defendant William David Finley for many years, although they had grown up together, he had not seen him for about ten years. Moore and Finley talked many times over the phone, with the calls initiated by Moore, and all monitored by the Federal Agents, with a tap to the phone in the adjoining apartment, installed without any warrant, and without knowledge to the telephone company. (T81)

Other calls by Moore on February 9 (Monitored), arranged for an additional purchase of cocaine from the defendant, delivered at the same apartment on February 10, 1977, monitored with pictures from the adjoining apartment. (T42) Co-defendant Miss Hicks again accompanied defendant Finley and carried his paraphernalia and wallet for him. (T43) This transaction was also recorded in pictures and by Agents who watched it through the two-way mirror. (T44).

Mr. Finley had been an addict ten years previously and had been convicted of a drug offense in 1966. He was incarcerated

and was paroled when he was able to kick the habit (T101) and had not been convicted of any crime since then, and worked as a laborer on a car-assembly line for General Motors. (T102) until he was hospitalized with his hip which required surgery from which he was recuperating at the time of the transactions involved in this case. (T101)

On July 8, 1977 the Honorable District Judge made an order denying defendant's request for criminal records of Government witnesses. (page 2 minutes of proceedings)

ARGUMENT

I

The Court of Appeals in Error Failed and Refused to Suppress the Recorded Monitored Telephone Conversations Taped Without a Prior Warrant From a Magistrate in Violation of Rights of the Defendants Under the Fourth and Fifth Amendments to the Constitution of the United States of America.

The District Court assigned to the Magistrate Court the task of holding a hearing on the defendants' motions to Suppress the transcripts of the electronic recordings and the recording of conversations between the Agent Provocateur, Moore and the defendant Finley. The Magistrate held hearings and concluded that the tapes and transcripts of the intercepted telephone conversations were admissible and that the Motions should be overruled. The District Court followed the recommendation of the Magistrate and admitted both the recordings and the transcripts. This was in error.

The Government and the Magistrate relied chiefly on two grounds, that the recordings were covered by Section 2511 (2)(c) which provides:

> "(c) It shall not be unlawful under this chapter [18 USCS §§ 2510-2520] for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."
>
> Title 18 U.S.C. Section 2511(2)(c)

and that it fell within the decisions of: *United States v. White* (1971), 401 U.S. 745, 28 L.Ed. 2d 453, 91 S.Ct. 1122 (*reh den.*) *and Hoffa v. United States* (1966), 385 U.S. 293, 17 L. Ed. 2d 374, 87 S.Ct. 408.

We shall treat the Hoffa case first because it is obviously inapposite. The facts and the problem in the Hoffa case just do not apply to the case at bar. In the Hoffa case there was no recording of intercepted electronic or wire messages. There an old crony of Hoffa mingled with the people conferring on Hoffa's of a criminal case then in trial, and relayed and recounted all he had heard and learned to the prosecution to be used in a later indictment of jury tampering in that original case, after that original principal case was over. There the court held that the informant's information and the use of it in the second trial need not be suppressed. The Hoffa case has no application to our cases at bar. Reliance on Hoffa is ill advised in these cases here.

Now, as to the reliance by the Court on the White case,[2] (supra) to say that the transcripts of the monitored conversations should not be suppressed, as they were in the Katz case[3] cannot be supported. In the White case the court held that the principles of Katz, did not apply to White because the Katz case was not to be considered retroactively, and the White case was tried before the Katz case was decided. That is the extent of the holding in White. It is to be noted that the editors of the Lawyers Edition Supreme Court Reports, analyze the majority holding in that case, as expressed by Justice Blackmun, as:

> "he . . . expressed the view that . . . (3) the Katz decision applies only to electronic surveillances occurring subsequent to its date, December 18, 1967" *United States v. White*, 28 L.Ed. 2d 453, lc . . .

The White case, (supra) certainly does not overrule the Katz case (supra) and does not abolish the principles of Katz, and

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[2] *United States v. White*, 401 US 745, 28 L.Ed. 2d 453, 91 S.Ct. 1122.

[3] *Katz v. United States*, 389 US 347. 19 L.Ed. 2d 576, 88 S.Ct. 507.

this should be made definite by the Honorable Supreme Court in the consideration of these cases at bar.

As to reliance on the Statute quoted previously, (Title 18 U.S. Code, Section 2510-2520) there would have to be proof that the person intercepting the oral communication was a party to the conversation or that one of the parties to the communication had given prior consent. Certainly none of the Treasury Agents or the Drug Enforcement Administration Agents was a party to the conversations. The parties were the defendant and Finley and the "Protected Witness" Moore. Moore did not intercept nor record the conversations, nor is there any record of any "Prior Consent" from Moore in the Transcript of this case. This is a criminal case, and no assumption may be made that Moore gave his consent to the recordings. This is a matter which must be proved beyond a reasonable doubt. I challenge the Government to quote where in the Transcript of the trial there is a question and answer involving the testimony of Moore that he gave permission for the electronic surveillance. The fact that he was a paid person to instigate drug trafficking, does not automatically prove that he gave permission for the interception and recording of the conversations. It must be proven by testimony the same as every other element of the offense. The testimony in the Transcript is that Moore did not have anything to do with arranging for the telephone taps. Therefore the Statute, Sections 2510 to 2520, Title 18 U.S. Code do not apply.

II

The Honorable Court of Appeals for the Eighth Circuit Failed to Follow the Principles and Decisions of the Honorable Supreme Court of the United States in Failing to Find That the Sale Here Was the Result of Unlawful Entrapment.

The facts in this case at bar represent the classic case of unlawful entrapment. Here we have a person in a wheel chair

charged with a serious crime, (selling Heroin, an offense for which he would be sentenced to from 5 to 15 years confinement) being offered not only his freedom from prosecution, but also money payment, and a chance to secure sustenance in the future for a long time as a "Protected Witness". All he had to do was to play on the sympathy of some of his old friends who might know where to secure drugs, to make a purchase for or to him in the "rigged" apartment set up by the Federal Agents. He thereby gives them ready-made offenses committed in their presence for easy arrests and convictions to make their records look good. The Government Agents create their own crime wave and solve it all at the same time, without regard to consequences. The AGENT PROVOCATEUR (as the counterpart is called by this honorable Court in an former case):

> "The under cover agent . . . is indeed often the instigator of and active participant in the crime—an AGENT PROVOCATEUR. Of course when the solicitation by the concealed government agent goes so far as to amount to entrapment the prosecution fails" (Citing other cases)
>
> *Osborn v. United States,* (1966) 385 US 323, 17 L.Ed 2d 394, 87 S.Ct. 439.

There is no question, and the government must admit, that the idea of securing cocaine and selling it did not originate with the defendants. It took several weeks and many phone calls of persuasion and provocation by the Government Agent Provocateur to get the defendant Finley to agree to secure some cocaine for the old friend in a wheel-chair. During this time telephone calls were monitored by Government Agents, although we do not know if all calls were fully monitored. We do know that some calls made by Moore were NOT transcribed, and whether these would show further rebuffs from the defendant, we cannot say, but the logical assumption is that if they had any culpatory use they would have been transcribed and brought into court as were the others favorable to conviction.

It must also be assumed that further attempts to secure additional purchases were made involving Finley and were unsuccessful, since the Government agents testified that they wanted to locate the SOURCE of Finley's cocaine (T.50). The Indictment in this case was not filed until June 23, 1977.

One of the earliest cases to recognize "entrapment" as a defense, was enunciated by the Honorable Eighth Circuit Court of Appeals, and later cited even by the Supreme Court. That case held:

> "(2) The first duties of the officers of the law are to prevent, not punish crime. It is not their duty to incite and to create crime for the sole purpose of prosecuting and punishing it."
>
> *Butts v. United States*, 273 F. 35, lc 36.

In our cases at bar, the evidence tends to establish, if it does not conclusively prove, that the first and chief endeavor of the "officers of the law" here, was to CREATE, to CAUSE, crime, in order to punish it, which is disapproved and disparaged in the *Butts* and *Osborne* cases, supra.

There is no evidence presented by the Government that: the defendant, nor either of them, had any predisposition to sell narcotics to the Government employee, nor anyone else, before he was incited to do so by the *Agent Provocateur* with offers of large sums of money and pleas of a favor for an old friend. The Government in its reply brief (if one is filed), cannot deny that it was only at the instigation and urging of their agent Moore, to procure monitoried sales, that defendants appeared in his apartment with the cocaine. There is no question nor any doubt that in this case at bar the Government officials were the instigators of defendants' conduct, and that "entrapment" is the exculpatory defense.

> "The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct."
>
> *Sorrells v. United States* (1932), 278 US 435, 77 L.Ed. 413, 535 S.Ct. 210.

In 1958, the Honorable Supreme Court of the United States issued the much quoted opinion in the Sherman case, relying on the same Butts case and Sorrells case (supra). This is now considered the leading case on the matter of entrapment as a defense, and the Court said:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 356 US at 732, 2 L.Ed. 2d 848, quoting Sorrells v. United States (supra), 287 US at 442, 77 L.Ed. 413, 86 S.Ct. 210.
> *Sherman v. United States*, 356 US 369, 2 L.Ed. 2d 848, 535 S.Ct. 210.

One might argue, as considered in the Court of Appeals, the words: "innocent person" in the above quotation might mean a person who had never before committed any crime, and therefore could not mean the defendant Finley in the case at bar, but this Honorable Court specifically pointed out in the Sherman case, supra, that:

> "Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated

conviction, from which the ordinary citizen is protected." *Sherman v. United States* (1958), 356 US 369, 2 L.Ed. 2d 848, 78 S.Ct. 819.

The same Opinion further stated:

"The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law."

Sherman v. United States, supra.

Considering all the above and the circumstances under which the *Agent Provocateur* finally got the defendants to secure some cocaine for him, these defendants should be allowed the defense of "unlawful entrapment."

III

The Court of Appeals, in Error, Held That There Was No Merit in Defendants' Claim That the District Court Erred in Denying Their Discovery Motion for the Criminal Records of Government Witnesses.

This appears to be a question of "first impression" with the United States Supreme Court, and of national application. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's ruling on the refusal of the Government to supply the criminal record of their chief witness, the Agent Provocateur, by citing the case of *Hemphill v. United States*, 392 F 2d 45, lc 48, where that court said:

"The assertion that the Government should have informed the defendant prior to trial of the criminal record of the Governments witnesses is utterly lacking in merit and requires no further comment."

That honorable court gave no citation nor any further comment, nor authority. We submit that this is a matter of national concern, and should deserve more consideration and discussion. The logic of supplying the criminal record of a Government witness, especially where it is an informer or a person soliciting others to engage in criminal activities, is not to be lightly passed over. The credibility of an ex-felon is not as worthy of belief as that of a person who has no criminal record. The search for truth is enhanced and not diminished by disclosure of a past record of a witness, and the United States Supreme Court should consider this important question and make an authoritative ruling concerning it.

The ruling of the District Court was in error and the United States Court of Appeals compounded the error when they affirmed the District Court. This was a violation of the rights of the defendants to a fair and impartial trial and a violation of their rights under the Fifth Amendment to the Constitution of the United States of America. The criminal record of the Government witness Albert Moore was especially material and relevant to the defense especially since he testified under oath that he had never been convicted of any crime or misdemeanor. (T78) If he had a criminal record this would affect his credibility and the defendants were entitled to know it on their request.

"The test of materiality in a case like Brady in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made . . .

When the prosecutor receives a specific request, the failure to make response is seldom, if ever, excusable."

United States v. Agurs, 427 US 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392.

CONCLUSION

We respectfully urge the Honorable Supreme Court of the United States to accept the problems outlined in this Application for decision and clarification, and to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. We submit that the defendants' rights were violated as set out above, in failure to suppress the monitored telephone calls of defendant Finley. We submit that there has been ample proof to establish that there was unlawful entrapment of an old crony by an *Agent Provocateur* who was hired to create crime not merely to disclose it. We respectfully urge upon the Court that the principles of the Katz and White cases need clarification by this Honorable Court. We urge respectfully, also, that the Honorable Supreme Court should settle the first impression problem of the question of discovery as it is applied to the criminal record of a Government Witness, where the defendant makes a specific request for such record.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. William David Finley and Sylvia Hicks, a/k/a Sylvia Micheau, Defendants.	No. 77-00159CR(4)

The Grand Jury charges:

That on or about February 9, 1977, in the County of St. Louis, in the State of Missouri, within the Eastern District of Missouri, the defendants

WILLIAM DAVID FINLEY and
SYLVIA HICKS a/k/a SYLVIA MICHEAU

knowingly and intentionally did distribute approximately 9 gram net weight of cocaine, a Schedule II narcotic drug controlled substance.

In violation of Section 841(a)(1), Title 21, United States Code.

SECOND COUNT

The Grand Jury further charges:

That on or about February 10, 1977, in the County of St. Louis, in the State of Missouri, within the Eastern District of

Missouri, the defendants WILLIAM DAVID FINLEY and SYLVIA HICKS a/k/a SYLVIA MICHEAU knowingly and intentionally did distribute approximately 8.15 grams net weight of cocaine, a Schedule II narcotic drug controlled substance.

In violation of Section 841(a)(1), Title 21, United States Code.

A True Bill

/s/ JAMES B. CARTER
Foreman

BARRY A. SHORT
United States Attorney

/s/ R. D. BILLEAUD
Assistant United States Attorney

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

United States of America vs. William David Finley, Defendant.	Docket No. 77-159Cr (3)

Judgment and Probation/Commitment Order

In the presence of the attorney for the government the defendant appeared in person on this date Month August Day 15, Year 1977.

Counsel—( ) Without Counsel. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

(X) With Counsel WALTER BRADY
(Name of counsel)

Plea—( ) Guilty, and the court being satisfied that there is a factual basis for the plea. ( ) Nolo Contendere. (X) Not Guilty.

Finding & Judgment—There being a verdict of ( ) Not Guilty. Defendant is discharged. (X) Guilty.

Defendant has been convicted as charged of the offense(s) of knowingly and intentionally distributing cocaine, a Schedule II narcotic drug controlled substance.

In violation of Section 841(a)(1), Title 21, United States Code, as charged in each of Counts I and II of the Indictment.

Sentence or Probation Order—The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWELVE (12) years as to and under the charges contained in each of Counts I and II of the Indictment and shall be followed by a special parole term of THREE (3) years under each of said counts.

It is Further Adjudged that the term of imprisonment and special parole term imposed under Count II of the Indictment shall run concurrently with the term of imprisonment and special parole term imposed under Count I.

Special Conditions of Probation—Defendant is released on bond pending appeal and shall call the U. S. Marshal Office daily at the direction of the U. S. Marshal.

Additional Conditions of Probation—In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation—The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By

(X) U. S. District Judge

( ) U. S. Magistrate

/s/ JOHN F. NANGLE
Date August 15, 1977

United States District Court for
Eastern District of Missouri
Eastern Division

United States of America

vs.

Sylvia Hicks,
Defendant.

Docket No.
77-159Cr (3)

Judgment and Probation/Commitment Order

In the presence of the attorney for the government the defendant appeared in person on this date Month August Day 15, Year 1977.

Counsel—( ) Without Counsel. However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

(X) With Counsel HARRY ROTH
(Name of counsel)

Plea—( ) Guilty, and the court being satisfied that there is a factual basis for the plea. ( ) Nolo Contendere. (X) Not Guilty.

Finding & Judgment—There being a verdict of ( ) Not Guilty. Defendant is discharged. (X) Guilty.

Defendant has been convicted as charged of the offense(s) of knowingly and intentionally distributing cocaine, a Schedule II narcotic drug controlled substance,

In violation of Section 841(a)(1), Title 21, United States Code, as charged in each of Counts I and II of the Indictment.

Sentence or Probation Order—The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) years as to and under the charges contained in each of Counts I and II of the Indictment and shall be followed by a special parole term of THREE (3) years under each of said Counts.

It is Further Adjudged that the term of imprisonment and special parole term imposed under Count II of the Indictment shall run concurrently with the term of imprisonment and special parole term imposed under Count I.

Special Conditions of Probation—Defendant is released on bond pending appeal and shall call the U. S. Marshal's Office daily at the direction of the U. S. Marshal.

Additional Conditions of Probation—In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of the judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation—The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By

(X) U. S. District Judge

( ) U. S. Magistrate

/s/ JOHN F. NANGLE
Date August 15, 1977

APPENDIX C

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. William David Finley, and Sylvia Hicks, Defendants.	No. 77-00159CR (4)

Notice of Appeal

(Filed August 17, 1977)

Appellant: Sylvia Hicks

Address: 7513 Blanding Dr., St. Louis, Mo. 63135

Defendant is at liberty on Bond

Appellant's Attorneys:

Harry Roth, 120 South Central, Clayton, St. Louis, Mo. 63105, 727-8888

Samuel Raban, Suite 2020—611 Olive Street, 231-1313—St. Louis, Mo. 63101

Offense: Two Counts, Violations of Section 841(a)(1), Title 21, United States Code

Judgment and Sentence: 4 years confinement, plus 3 years parole, on each count to run concurrently.

Date of Judgment: August 15, 1977

Date of this Notice: August 17, 1977

Statement of Appeal: This Defendant, Syvlia Hicks, being aggrieved by the above judgment and sentence hereby appeals to the United States Court of Appeals for the Eighth Circuit, for relief from the above judgment and sentence on grounds more fully set out in the Statement of Issues and Brief to be filed.

/s HARRY ROTH
Attorney for Appellant

HARRY ROTH
120 South Central, Clayton
St. Louis, Missouri 63105
727-8888

APPENDIX D

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. William David Finley, and Sylvia Hicks, Defendants.	No. 77-00159CR (4)

Notice of Appeal

(Filed August 17, 1977)

Appellant: William David Finley

Address: 2815 Maurer, St. Louis, Mo. 63121

Defendant is at liberty on Bond

Appellant's Attorneys:

Harry Roth, 120 South Central, Clayton, St. Louis, Mo. 63105, 727-8888

Samuel Raban, Suite 2020—611 Olive Street, 231-1313—St. Louis, Mo. 63101

Offense: Two Counts, Violations of Section 841(a)(1), Title 21, United States Code

Judgment and Sentence: 12 Years Confinement, plus 3 years parole, on each Count to run concurrently

Date of Judgment: August 15, 1977

Date of this Notice: August 17, 1977

Statement of Appeal: This Defendant, William David Finley, being aggrieved by the above judgment and sentence hereby appeals to the United States Court of Appeals for the Eighth Circuit, for relief from the above judgment and sentence on grounds more fully set out in the Statement of Issues and Brief to be filed.

/s/ HARRY ROTH
Attorney for Appellant

HARRY ROTH
120 South Central, Clayton
St. Louis, Missouri 63105
727-8888

APPENDIX E

United States Court of Appeals
for the Eighth Circuit

Nos. 77-1663 and 77-1664

United States of America,
Appellee,
v.
William David Finley and Sylvia Hicks,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: February 23, 1978

Filed: February 28, 1978

Before Lay, Bright, and Ross, Circuit Judges.

Per Curiam.

The defendants were charged with two counts of distributing a controlled substance (cocaine), in violation of 21 U.S.C. § 841(a)(1). Following a trial to the court,[1] both defendants were found guilty as charged. Finley was sentenced to concurrent terms of 12 years imprisonment and 3 years special parole on each count. Hicks received concurrent terms of 4 years imprisonment and 3 years special parole.

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

It is undisputed that on the dates charged the defendants met with a confidential government informant (Albert Moore) at an apartment in St. Louis County and distributed cocaine to Moore in exchange for cash. The apartment was specially constructed by the government for the surveillance of illicit conduct: activities in the apartment could be monitored, by means of a one-way mirror and various recording apparatus, from an immediately adjoining apartment. Government agents directly observed the drug transactions and produced photographic evidence of the first meeting and a videotape of the second meeting.

Defendants argue that the district court erred in not finding entrapment as a matter of law. They contend that the ultimate transactions were initiated by a telephone call from Moore to Finley, in which Moore asked Finley to obtain cocaine for him. Moore also made follow-up calls. However, the district court found "no credible evidence the government's activity implanted in either of the defendants' minds the disposition to sell the cocaine," and that "the defendants were predisposed to commit the offense as charged."

Entrapment as a matter of law exists only where the undisputed facts show that "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States*, 287 U.S. 435, 442 (1932). *See also Sherman v. United States*, 356 U.S. 369, 372 (1958). In the instant case the government produced a tape recording of the initial conversation between Moore and Finley, as well as recordings of later conversations leading directly to the sales. In that initial conversation, the following exchanges appear:

> Moore: * * * I wanted some that old gal [cocaine], it from ya.
>
> Finley: Yes, it's around, but, I can't get it to right now, though.

Moore: Oh, you can't?

Finley: No, the one that do that for me, he ain't staying at the house.

* * *

Moore: Huh, hum, what about you know, like a 15 hundred, what would I get.

Finley: I can fix you, real nice.

* * *

Moore: Well, cool, O.K., well I am goin' to get in touch —let me see tomorrow—tell me what time you want me to call you.

Finley: Well, whenever time you want, I can get it lined up for later on this evening if I know definitely, ya dig?

In addition to this evidence, Moore testified that Finley had told him a year or so previously that whenever Moore was ready, Finley could get cocaine for him. The record is thus clear that defendants failed to establish entrapment as a matter of law. *Cf. United States v. Gurule*, 522 F.2d 20 (10th Cir. 1975), *cert. denied*, 425 U.S. 976 (1976).

Defendants further contend that tapes of the telephone conversations between Moore and Finley, recorded by government agents with Moore's consent, were made in violation of their constitutional rights and should have been suppressed. The law is clear, however, that the consent of the government informant to such official eavesdropping vitiates the claim of illegality. *See United States v. Kirk*, 534 F.2d 1262, 1272 (8th Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Rich*, 518 F. 2d 980, 985 (8th Cir. 1975), *cert. denied*, 427 U.S. 907 (1976).

Likewise without merit is defendants' claim that the court erred in denying their discovery motion for the criminal records of government witnesses. *Hemphill v. United States*, 392 F.2d 45, 48 (8th Cir.), *cert. denied*, 393 U.S. 877 (1968).

Finally, defendant Hicks contends that the evidence is insufficient to convict her of distribution. The undisputed evidence shows that, with respect to both transactions, Hicks was the carrier of the cocaine. Further, in the first transaction Hicks sat at the table where business was conducted and took possession of that portion of the cocaine not distributed to Moore. The evidence sufficiently shows that she was fully aware of the nature of the proceedings in which she was involved. Viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60 (1942), there was ample evidence sustaining Hicks' convictions.

The judgments of the district court are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

United States Court of Appeals
for the Eighth Circuit

September Term, 1977

77-1663
United States of America,
Appellee,

vs.

William David Finley,
Appellant.

77-1664
United States of America,
Appellee,

vs.

Sylvia Hicks, etc.,
Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 17, 1978

APPENDIX G

United States Court of Appeals
for the Eighth Circuit

Nos. 77-1663 and 77-1664 September Term, 1977

United States of America,
Appellee,

v.

William David Finley and Sylvia Hicks a/k/a Sylvia Micheau,
Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.

Motion of appellants for stay of mandate in the above cases having been considered by the Court it is now here ordered that the motion be, and it is hereby, denied.

March 22, 1978
